

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JESSE PEARSON,

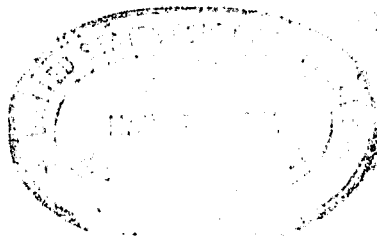
Appellant.

Docket No. 74-1011

4/11

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether it was error to permit the Government to
introduce into evidence a letter which attested to the truth-
fulness of the key government witness.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Orrin G. Judd) rendered on December 28, 1973, after a trial before a jury, convicting appellant Pearson of unlawfully receiving and concealing a quantity of goods stolen from interstate commerce, in violation of 18 U.S.C. §§2315 and 2, and sentencing him to a term of imprisonment for one year, sixty days to be served on three-day weekends, and the balance to be suspended; to a term of probation for two years; and to a fine of \$1,000.

Execution of the sentence was stayed, and appellant is free on bail pending appeal. Leave to appeal in forma pauperis was granted, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Pearson and three others were indicted for concealing goods stolen in interstate commerce and having a value of more than \$5,000, and of aiding and abetting the commission of that crime.

Ira Kirschner was the key witness for the Government, and he presented the primary evidence against the four defendants. The record reveals that prior to testifying before the grand jury Kirschner engaged a lawyer. He and the lawyer went to the office of the Assistant United States Attorney, at which time the Assistant wrote a letter addressed "To whom it may concern" and which stated that in exchange for Kirschner's "true and complete" testimony the Government promised complete freedom from prosecution for the crime involved. By the Government's terms, a prosecution for perjury was the only proceeding to which Kirschner could have been subjected (118-19*). The Government introduced into evidence the letter setting out the terms of the bargain. Defense counsel objected to this on the ground that the letter constituted a vouching by the Government for the reliability and credibility of its witness (116-17).

Kirschner testified that his business was buying health and beauty aids from manufactures and wholesalers and selling them to drug and discount stores (109), and that he was on the verge of bankruptcy (110). His place of business was a 2,000 square foot warehouse in an industrial park in Plainview, New York (109). On the night of August 28, 1972, he received a forty-foot vanload of stolen Colgate products. He spent five hours, with defendants Polito, Buttafuoco, Rayll,

*Numerals in parentheses are references to pages of the trial transcript.

and appellant, unloading the contents of the truck into his warehouse.

These events occurred after a chance meeting during June 1972 between Kirschner and Buttafuoco, who had been acquaintances in earlier years. At that meeting, Kirschner told Buttafuoco about his business problems, and the latter told Kirschner that because he was in the trucking business he might be able to help him (124).

A few weeks later Buttafuoco came, with Rayll, to the warehouse (126). Rayll asked what goods Kirschner could sell most easily, and Kirschner replied, "Toiletries." Rayll thought he could do something, and the three men agreed to be in contact (138).

A few weeks later Rayll introduced Polito to Kirschner (140). Polito examined the warehouse (143), and explained the way he would get a load of Colgate products from the Jones Trucking Company (144).

On August 28, 1974, Buttafuoco, Rayll, and Polito called to say a truck would be coming that night about nine o'clock (147-49). Kirschner objected to the nighttime delivery because of the suspicious nature of the scene (147-49), but was unavailing. That night the forty-foot tractor-trailer arrived, driven by appellant with Polito next to him (152). Buttafuoco arrived in his own car (152). Rayll was already there.

The trailer was too high to be driven into the ware-

house, so it was backed up flush against the door (154) and the 4,300 cases were unloaded (156) in five hours (158) by the four men (157). Later, Kirschner made arrangements to sell the goods (168).

The parties stipulated that in August 1972 Buttafuoco's telephone number was 516/681-3742 (289); Polito's was 201/225-9375; Rayll's number was 516/731-5351; Pearson's number was 201/925-4976; Kirschner's business number was 516/293-9485; and the Rayburn Trucking Company was 201/353-1337. Telephone company records showed that the following calls were made: (1) from Rayll's number to 201/225-9375, at 6:45 p.m. on August 28 (291); (2) from Buttafuoco's number to Polito's number on July 13 (293); (3) from Polito's number to Buttafuoco's number on August 28, 1972, at 5:30 p.m. (293-94); (4) from Rayburn Trucking Company to the Schiavone Fitzpatrick Company* number on August 28 at 12:55 p.m. (294); (5) from the Rayburn Trucking Company number to Polito's number on August 28 at 6:38 p.m. (294); (6) from Rayburn Trucking Company to Kirschner's company number at 6:50 p.m. (296); (7) from Rayburn Trucking Company to Polito at 7:01 p.m. (296); (8) from Kirschner's company to Polito at 10:50 p.m. (296); and (9) from the telephone of appellant's home to that of John Berrico** on August 29, 1972, at 3:34 a.m. ().

*This was Polito's place of employment (311).

**A man named John Verico was said to be a dispatcher for the Rayburn Trucking Company.

The parties stipulated that Steven Cavico, an official of the Jones Trucking Company (334-37), would testify that the goods involved were of greater value than \$5,000 (338), that they were stolen from the Jones Trucking Company plant in Elizabeth, New Jersey (which shared premises with the Rayburn Trucking Company) (336), on August 28, 1972, at about 5:00 p.m. (337). See 340.

In defense, appellant testified that for twenty years he was a long distance tractor-trailer driver (484) for the Rayburn Trucking Company, which became the Broadway Transfer Company (404) and was owned by Paul Jones (485). He denied knowing any of the co-defendants (486).

Appellant testified that on August 28-29, 1972, he was making a delivery in North Carolina (487-88). He left on the afternoon of August 27 for Rocky Mountain, North Carolina (508), arriving there, at the Thomas & Howard Warehouse (510), between 8:00 and 9:00 a.m. on August 28 (510). He had to wait to unload, and finished during the evening of August 28 (518).

In rebuttal, the Government called Steven Cavico and Michael Zeyock, partners in the Jones Trucking Company, who testified that they saw Polito and appellant together in the Rayburn Company office (536, 542). Also in rebuttal the Government called Niles Joyner, warehouse manager for Thomas & Howard (561). He testified that the company had no record of receiving a Colgate shipment on August 28, and that he had

never heard of Rayburn Trucking (562). On August 29, a shipment was received from Coastal Truck Lines (563) from driver Larry Betts (565). Joyner acknowledged that a Colgate shipment was received by his company on August 31 from Rayburn (579), and that the records appeared to reflect that the driver's name was "Gus."

After deliberation, the jury found appellant guilty as charged.

ARGUMENT

IT WAS ERROR TO PERMIT THE GOVERNMENT TO INTRODUCE INTO EVIDENCE A LETTER WHICH ATTESTED TO THE TRUTHFULNESS OF THE KEY GOVERNMENT WITNESS.

At the beginning of trial the Government properly revealed that Kirschner had been promised that he would not be prosecuted for the crimes resulting from these activities in exchange for his testimony at the trial. However, the Government introduced a letter addressed "To whom it may concern" and which revealed that Kirschner agreed to testify "truthfully and completely." Counsel objected to this portion of the letter, arguing that, by its language, it constituted an effort by the prosecutor to vouch for the credibility of his witness.

It is clear that the law prohibits action by the prosecutor which supports the credibility of his own witness or places the authority of his office in a position of advising the jurors that the witness is telling the truth. United States v. Puco, 436 F.2d 761 (2d Cir. 1961); United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970); Gradsky v. United States, 373 F.2d 706, 710 (5th Cir. 1967); Greenberg v. United States, 280 F.2d 472, 474-75 (2d Cir. 1960).

The letter contained the forbidden affirmance of the truthfulness of Kirschner's testimony. The letter, written

by the very prosecutor who tried the case, states that Kirschner agreed to testify truthfully. The fact that the Government then called Kirschner as its witness to testify in support of its case must have advised the jurors that the Government believed such testimony was the truth. Further, calling Kirschner as a witness implied that the Government might have had off-the-record reasons for believing he was telling the truth.

In addition, the fact that the jurors were told in the same letter that Kirschner could be prosecuted for perjury if his testimony was untrue could not change the jury's reaction to the earlier part of the letter. The jurors would never be aware of any subsequent perjury prosecution. Thus, there was no basis for any belief that calling the witness did not compel acceptance of the truth of his testimony.

CONCLUSION

For the above-stated reasons, the judgment should be reversed and a new trial granted.

Respectfully submitted,

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March 14, 1974

Certificate of Service

Mar. 14, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

Phyllis Abbot Rosenberg